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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058638
Party	Plaintiff Lisa Alyn
Correspondence Address	GREGORY D LATHAM INTELLECTUAL PROPERTY CONSULTING LLC 201 ST CHARLES AVE, SUITE 2500 NEW ORLEANS, LA 70170 UNITED STATES glatham@iplawconsulting.com, brandon@proentertainmentlaw.com
Submission	Opposition/Response to Motion
Filer's Name	Gregory D. Latham
Filer's e-mail	glatham@iplawconsulting.com
Signature	/Gregory D. Latham/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Lisa Alyn
Petitioner,

v.

Southern Land Company, LLC
Registrant.

Opposition No. 92058638

U.S. Trademark Reg. Nos. 3,101,151 and
3,101,151

**MEMORANDUM IN OPPOSITION
TO RESPONDENT'S MOTION TO COMPEL**

Petitioner Lisa Alyn ("Ms. Alyn") respectfully submits this memorandum in opposition to the motion of respondent Southern Land Company, LLC ("Southern Land") to compel further responses to Southern Land's Request for Admissions, Southern Land's Interrogatories, and Southern Land's Requests for Production of Documents (the "Discovery Requests").

I. INTRODUCTION

Southern Land's motion is a procedural delay tactic to evade appearing for previously requested depositions and to delay providing documents to Ms. Alyn. On October 1, 2014, Ms. Alyn's counsel asked Southern Land to provide dates for the inspection of documents previously identified in Southern Land's discovery responses and for the deposition of key Southern Land employees.¹ Southern Land did not respond. On October 3, 2014, Ms. Alyn's counsel again requested from Southern Land dates for the document inspection and depositions.² On October 6, 2014, Southern Land filed this meritless discovery motion and now, using the motion as a shield, refuses to give Ms. Alyn's counsel access to previously identified documents or to move forward with the previously requested depositions.³

¹ See October 1, 2014, email attached as Exhibit 1.

² See October 3, 2014, email attached as Exhibit 2.

³ See October 10, 2014 email, attached as Exhibit 3.

Ms. Alyn's discovery responses were provided to Southern Land on July 11, 2014. Now, nearly three (3) months later -- and only after Ms. Alyn sought access to Southern Land's documents and depositions of Southern Land's employees -- did Southern Land move to compel supplemental responses. Southern Land's bad faith attempt to delay production of its documents, delay appearing for depositions, and delay the overall progress of this case should be admonished by the Board.

At issue in these proceedings is whether Southern Land fraudulently obtained its registrations for the term "Westhaven" by withholding information regarding the geographical significance of the term "Westhaven." This is not a proceeding that requires any likelihood of confusion analysis; comparisons of the marks, the parties' goods and services, the parties channels of trade, and other confusion indicia are not relevant to this proceeding. This is not a proceeding that requires a determination of which party is the senior user; comparisons of first use dates and similar factors are not relevant to this proceeding. Ms. Alyn asserts that Southern Land's registrations should be cancelled for fraud; Southern Land has asserted no substantive affirmative defenses, but rather merely contends its actions do not constitute fraud.

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, a requesting party must show either that (i) the information sought is relevant to a claim or defense or (ii) there is "good cause" for allowing broader discovery of information relevant to the "subject matter" of the proceedings. Southern Land has made no attempt to demonstrate that good cause exists for the broader "subject matter" discovery. Therefore, Southern Land is required to demonstrate that its discovery is directly relevant to a claim or defense in these proceedings. Southern Land has not, and cannot, make that showing. Southern Land half-heartedly asserts that its sweeping discovery requests are relevant to the issue of standing, an issue that requires analysis of all the likelihood of confusion factors. But, standing is not a genuine issue in these proceedings; it is a red herring created by Southern Land. Ms. Alyn's Petition for Cancellation establishes as a matter of law her standing to bring this action; moreover, Southern Land has never challenged Ms. Alyn's standing.

Because Southern Land has failed to demonstrate either that (i) the information sought is relevant to a claim or defense, or, (ii) there is “good cause” for ordering broader discovery, its motion to compel should be denied. Ms. Alyn respectfully requests that this matter be allowed to move forward quickly so as to avoid the delay intentionally sought by Southern Land.

II. FACTUAL BACKGROUND

“Westhaven” is the name of a geographical area about twenty (20) miles south of Nashville, Tennessee. Ms. Alyn is a real estate agent that advertises and provides her services in Westhaven.⁴ Ms. Alyn received a cease and desist letter dated October 21, 2013 from Southern Land demanding that she cease and desist from using the term “Westhaven” to advertise her real estate services.⁵ In the letter, Southern Land stated that Southern Land owned the U.S. Trademark Registration No. 3,101,151 for the mark WESTHAVEN and U.S. Trademark Registration No. 3,101,150 for the mark and design WESTHAVEN (collectively, “Southern Land’s Trademark Registrations”).⁶ Ms. Alyn was shocked to learn of Southern Land’s federal registrations for terms that are clearly geographically descriptive. As Ms. Alyn’s attorneys researched Southern Land’s Trademark Registrations, it was discovered that Southern Land fraudulently obtained the registrations. During the application process which led to both registrations, the United States Patent and Trademark Office (“USPTO”) trademark examiner expressly asked Southern Land to state whether the term “WESTHAVEN” has any geographical significance.⁷ Although “Westhaven” is clearly a geographical term used to designate a specific

⁴ See, Petition for Cancellation (1 TTABVUE at 1).

⁵ See *Id.*; see also, October 21, 2013, cease and desist letter attached as Exhibit 4.

⁶ *Id.*

⁷ Southern Land’s application to register “WESTHAVEN” was filed on June 20, 2003 and assigned Serial No. 76/524401. On January 5, 2004, the USPTO issued an Office Action which, among other things, required Southern to “indicate whether ‘WESTHAVEN’ has any significance in the relevant trade, or any geographical significance.” Similarly, Southern Land’s application to register the composite mark “W WESTHAVEN” was filed on June 20, 2003 and assigned Serial No. 76/524137. Again on January 5, 2004, the USPTO issued an Office Action which, among other things, required Southern to “indicate whether ‘WESTHAVEN’ has any significance in the relevant trade, or any geographical significance.” Copies of the January 5, 2004 Office Actions were submitted with Ms. Alyn’s Petition for Cancellation, Exhibit A (1 TTABVUE at Exhibit A).

area, Southern Land fraudulently misinformed the USPTO by responding that “Westhaven has no geographical significance.”⁸ Based on Southern Land’s fraudulent response to this inquiry, Southern Land’s applications were allowed to mature into registration.

Ms. Alyn’s attorneys responded to Southern Land’s cease and desist letter by informing Southern Land that Ms. Alyn would not stop using the descriptive term “Westhaven” in connection with her real estate services offered in Westhaven, Tennessee. Ms. Alyn also informed Southern Land that if it continued to threaten to initiate litigation against her, she would move to cancel Southern Land’s fraudulently-obtained trademark registrations. Southern Land continued to threaten Ms. Alyn with litigation. In order to resolve the illegitimacy of Southern Land’s fraudulently-obtained trademark registrations, Ms. Alyn filed her Petition of Cancellation, initiating these proceedings.⁹

Southern Land’s compel motion does not seek information regarding fraud - the singular claim in these proceedings. Instead, Southern Land’s compel motion goes far beyond what is allowed by Rule 26, demanding discovery as if this were a trademark infringement matter. Southern Land’s Discovery Requests constitute a fishing expedition. The Discovery Requests are the type of unduly burdensome, expensive and oppressive discovery that is now clearly forbidden under Rule 26.

III. LAW AND ARGUMENT

A. Southern Land Is Not Entitled To The Discovery Demanded

Southern Land’s discovery requests are not relevant to any claim or defense of the parties and Southern Land has not shown good cause for its discovery requests. As a result, Southern Land’s motion should be denied. This is not a proceeding for contesting the likelihood of

⁸ Exhibit B to Ms. Alyn’s Petition for Cancellation (1 TTABVue at Exhibit B) are copies of Southern Land’s responses to the Office Actions issued in connection with Serial No. 76/524401 and Serial No. 76/524137. On page 2 of the responses, Southern states: “Finally, the Examining Attorney states that Applicant must indicate whether ‘WESTHAVEN’ has any significance in the relevant trade, or any geographical significance. Applicant submits that ‘WESTHAVEN’ does not have any significance in the relevant trade, or any geographical significance.”

⁹ Ms. Alyn’s Petition for Cancellation (1 TTABVue at 1-4).

confusion between marks. It is a cancellation proceeding brought to cancel Southern Land's trademark registrations for fraud. The only issue is whether Southern Land's Trademark Registration should be cancelled in light of the fraud committed by Southern Land.

As the Board knows, in 2000 Federal Rule of Civil Procedure 26 was amended. According to Rule 26(b)(1), as amended, party-initiated discovery must be of information "relevant to the claim or defense of any party." Fed.R.Civ.P. 26, Advisory Committee Notes, 2000 Amendment. A court may order information "relevant to the subject matter involved in the action," but "[o]nly for good cause shown." *Id.* The Advisory Committee's purpose of the amendment was "to involve the court more actively in regulating the breadth of sweeping or contentious discovery." *Id.* (emphasis added). Therefore, when an objection arises as to the relevance of discovery, "the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it, so long as it is relevant to the subject matter of the action." *Id.*; *see also In re Sealed Case (Med.Records)*, 381 F.3d 1205, 1215 n. 11 (D.C.Cir. 2004). In other words, the requesting party bears the burden of demonstrating either that (1) the information sought is relevant to a claim or defense or (2) there is "good cause" for ordering discovery of information relevant to the subject matter. *In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008).

Southern Land's motion to compel makes no attempt whatsoever to establish that good cause exists to authorize discovery beyond the actual claims or defenses. Therefore, under the 2000 amendments to the Rule, discovery demands must "focus on the actual claims and defenses involved in the action." Advisory Committee Notes to 2000 Amendment (emphasis added).

In a feeble attempt to identify a claim or defense that makes its discovery requests relevant, Southern Land argues that any request directed at the issue of likelihood of confusion is relevant because Ms. Alyn must demonstrate her standing in these proceedings.¹⁰ But, standing is not a claim or defense at issue in this proceeding. In her Petition for Cancellation, Ms. Alyn

¹⁰ Southern Land's Motion to Compel, p. 4 (6 TTABVue at 4).

alleges that she does business using the descriptive term Westhaven and that she received a cease and desist letter from Southern Land demanding that she stop use of the descriptive term.¹¹ The Board's precedent is clear that a petitioner's use of the challenged mark, coupled with receipt of a cease and desist letter, constitute a valid basis for standing. *See, Miller v. Miller*, 105 USPQ2d 1615, 1625 (TTAB 2013); *Syntax U.S.A. Inc. v. E.R. Squibb & Sons, Inc.*, 14 USPQ2d 1879 (TTAB 1990); and, *Ipcor Corp. v. Blessings Corp.*, 5 USPQ2d 1974 (TTAB 1974). Moreover, Southern Land has never challenged Ms. Alyn's standing in its Answer¹² or otherwise. Southern Land admits Ms. Alyn's allegations that give rise to standing and does not assert any challenge to standing.¹³ Put simply, standing is not a claim or defense in this proceeding. Thus, any discovery requests purportedly aimed at the issue of standing are not relevant.

1. Requests Regarding Ms. Alyn's Knowledge of Southern Land and Southern Land's Marks Are Not Relevant to Any Claim or Defense

Southern Land made the following sweeping discovery requests regarding Ms. Alyn's knowledge of Southern Land and Southern Land's Trademark Registrations:

Interrogatory No. 9: Identify all documents in the possession, custody or control of You referring or relating to Registrant and Registrant's Marks.

Interrogatory No. 10: Identify all documents in the possession, custody or control of Petitioner relating to Registrant's Marks.

Request No. 6: Produce all documents in your possession that refer to Registrant.

Request No. 7: Produce all documents in your possession that refer to Registrant's Marks.

Request No. 8: Produce all documents relating to Your knowledge of Registrant's intellectual property protection for Registrant's Marks.

Request No. 25: Produce all documents related to Petitioner's knowledge of Registrant and any or all of the Registrant's Marks.

¹¹ Ms. Alyn's Petition, p. 1 (1 TTABVue at 1)

¹² Southern Land's Answer; (4 TTABVue)

¹³ Indeed, even in its motion to compel, Southern Land does not expressly argue that Alyn lacks standing to bring this proceeding.

Request No. 26: Produce all documents related to Petitioner's knowledge of services offered by Registrant under any or all of Registrant's Marks.

Ms. Alyn properly objected to these requests as irrelevant because they do not relate to any claim or defense in this proceeding. The only issue in this proceeding is whether Southern Land fraudulently represented to the Board that the term "Westhaven" has no geographical significance. While these interrogatories and requests for production may be relevant in a matter involving likelihood of confusion, they have no relevance to whether the term "Westhaven" has geographical significance.

2. Discovery Requests Regarding Ms. Alyn's Clients Are Not Relevant To Any Claim or Defense

Southern Land served the following interrogatory and document request seeking information regarding Ms. Alyn's clients:

Interrogatory No. 7: Identify Your target purchasers for the services offered under the WESTHAVEN mark.

Request No. 31: Produce all documents reflecting or regarding the buyers of the services offered by You under the WESTHAVEN mark.

Ms. Alyn objected to these requests on the ground that the information sought is not relevant to any claim or defense in the proceeding. Again, while Ms. Alyn's clients may be relevant in a matter involving likelihood of confusion, they have no relevance to this fraud proceeding. In support of its argument, Southern Land cites *J.B. Williams Co. v. Pepsodent G.mb.H*, 188 USPQ 577, 580 (TTAB 1975). Conveniently, Southern Land fails to mention that *J.B. Williams Co.* is a dispute regarding the likelihood of confusion between marks and was decided long before Rule 26 was amended. This proceeding does not involve analysis of the likelihood of confusion between marks. Ms. Alyn's target customers simply are not relevant to whether "Westhaven" has any geographical significance.

3. Ms. Alyn's Sales and Advertising Are Not Relevant To Any Claim Or Defense in These Proceedings

Southern Land issued numerous document requests and interrogatories seeking production of information relating to Ms. Alyn's real estate sales and her advertising expenditures:

Request No. 14: Produce all documents showing or relating to sales of Your services under the mark WESTHAVEN.

Request No. 16: Produce all documents relating to the costs of advertising already implemented for any and all services offered under the mark WESTHAVEN by You.

Request No. 18: Produce all documents relating to sales strategies for the services offered under the mark WESTHAVEN by You.

Request No. 34: Produce all documents reflecting or regarding the dollar value of sales or projected sales of the services offered by You under the WESTHAVEN mark, including but not limited to documents reflecting or discussing how such projected sales numbers were determined.

Request No. 35: Produce all documents showing the amount of money budgeted and/or expended to date to promote the services offered by You under the WESTHAVEN mark.

Interrogatory No. 8: Identify (a) the three persons most knowledgeable as to the advertising or the plans for advertising Your services under the WESTHAVEN mark and (b) documents showing the sales and plans for sales and advertising and plans for advertising under the WESTHAVEN mark.

Request No. 15: Produce all documents showing or relating to the advertising of Your services under the mark WESTHAVEN.

Request No. 17: Produce representative samples of all advertising which has been implemented and representative samples of all planned advertising for the services offered by You under the mark WESTHAVEN.

Request No. 18: Produce all documents relating to sales strategies for the services offered under the mark WESTHAVEN by You.

Request No. 19: Produce all documents relating to the advertising strategies for the services offered under the mark WESTHAVEN by You.

Ms. Alyn properly objected to these requests because they are not relevant to any claim or defense in this proceeding. While requests may be relevant in a matter involving likelihood of confusion analysis, they have no place in this proceeding.

Southern Land uses *American Optical Corp. v. Exomet, Inc.*, 181 USPQ 120, 123 (TTAB 1974) in support of its argument that annual sales and advertising expenses of goods incorporating a party's mark is discoverable. Not surprisingly, *American Optical Corp.* is a dispute regarding the likelihood of confusion between two marks that was decided several years before Rule 26

was amended. Clearly, information regarding Ms. Alyn's annual sales and advertising figures are not relevant to the issue of whether "Westhaven" has any geographical significance.

4. Agreements Between Ms. Alyn And Third Parties Regarding Use of the Term Westhaven Are Not Relevant To Any Claim Or Defense

Southern Land propounded an interrogatory and a document request seeking information regarding agreements between Ms. Alyn and third parties regarding use of the term Westhaven:

Interrogatory No. 15: Identify all agreements relating to Your use of the mark WESTHAVEN and services offered or to be offered under the mark WESTHAVEN, including without limitation agreements relating to advertising of the services offered under the WESTHAVEN mark, assignments, licenses, authorizations, permissions or consents.

Request No. 24: To the extent that documents have not been produced in response to the preceding document requests, produce all documents showing any and all agreements related to the mark WESTHAVEN, including without limitation, agreements relating to advertising under the mark, assignments, licenses, authorizations, permissions or consents.

Again, Ms. Alyn objected on the grounds of relevance. The information sought by these requests have absolutely no bearing on the singular issue in this proceeding: whether Southern Land fraudulently procured its registrations.

Southern Land relies on *Johnston Pump/General Valve Inc. v. Chromally American Corp.*, 10 USPQ2d 1671 (TTAB 1988) for the proposition that agreements regarding a mark at issue between the owner and third parties is discoverable. *Johnston Pump/General Valve Inc.* is a case involving a dispute over the likelihood of confusion between marks and was decided well before the amendment to Rule 26; the case is completely inapposite to the facts present in this proceeding.

5. Ms. Alyn's Selection and Adoption Of The Term "Westhaven" Is Not Relevant To Any Claim Or Defense

Southern Land issued several discovery requests regarding Ms. Alyn's decision to use the term "Westhaven" to promote her real estate services:

Interrogatory No. 1: Identify (a) the three people most knowledgeable as to the creation, selection, adoption, and use of WESTHAVEN by You and (b) the three people most knowledgeable as to the services provided by You under the WESTHAVEN mark.

Interrogatory No. 4: State the reasons for Your selection of the WESTHAVEN mark for use on or in connection with real estate services and identify the person(s) who first suggested, proposed, recommended, conceived of, or suggested use of the WESTHAVEN mark in connection with these services.

Interrogatory No. 5: Describe in detail all steps which were taken in connection with creation and adoption of Petitioner's Mark, and identify all documents which relate to creation and adoption of Petitioner's Mark.

Request No. 2: Produce all documents related to your creation, selection and adoption of the WESTHAVEN mark, including without limitation search reports, market surveys, emails and interoffice memoranda.

Request No. 10: Produce all documents relating to the reasons for Your selection of the WESTHAVEN mark in connection with Your real estate services.

Request No. 44: Produce all documents that relate to every other alternative mark which was considered for adoption and use in connection with Your real estate services.

While the information sought by these requests may be relevant in a matter involving likelihood of confusion, they have no relevance to the claims or defenses in this proceeding. Southern Land's reliance on *Volkswagenwerk Aktiengesellschaft v. MTD Products Inc.*, 181 USPQ 471, 473 (TTAB 1974) and *Goodyear Tire & Rubber Co. v. Tyco Industries*, 186 USPQ 207, 208 TTAB 1975) is misplaced. While those decisions stand for the proposition that information relating to the selection and adoption of a mark is discoverable, in each of those cases the Board was required to undertake a likelihood of confusion analysis. Moreover, both of those decisions came decades before Rule 26 was amended. Ms. Alyn's selection and adoption of a mark is not relevant in these proceedings.

6. Ms. Alyn's First Use Of The WESTHAVEN Mark Is Not Relevant To Any Claim Or Defense

The following are Southern Land's discovery requests regarding Ms. Alyn's first use of the WESTHAVEN Mark:

Request No. 20: Produce all documents relating to the date the mark WESTHAVEN was first used by You in connection with real estate services.

Request No. 21: Produce all documents, as applicable, relating to the first property sold under the mark WESTHAVEN by You.

Once again, Ms. Alyn properly objected to these requests as not relevant to any claim or defense in this proceeding. Southern Land cites *Georgia Pacific Corp. v. Great Plains Bag Co.*,

190 USPQ 193, 195-96 (TTAB 1976) in support of its request for this information. However, like most of the precedent relied upon by Southern Land, *Georgia Pacific Corp.* is a likelihood of confusion case. The decision was also decided long before Rule 26 was amended.

7. Ms. Alyn's Use of the Term Westhaven is Not Relevant to Any Claim Or Defense

Lastly, Southern Land demands that Ms. Alyn produce information regarding Ms. Alyn's services offered in connection with the term "Westhaven":

Interrogatory No. 2: Identify and describe in detail each service offered by You under the mark WESTHAVEN and identify and describe in detail where these services are offered.

Request No. 4: Produce all documents which relate or refer to Your use of the WESTHAVEN mark in connection with real estate.

As with the requests discussed above, these requests may be relevant in a matter involving likelihood of confusion; but information relating to Ms. Alyn's services has no bearing whatsoever in a determination of whether Southern Land fraudulently informed the trademark examiner that the term "Westhaven" has no geographical significance.

B. Ms. Alyn Is Unable To Admit Or Deny Facts Exclusively Within Knowledge Of Southern Land

Southern Land propounded upon Ms. Alyn twelve (12) admission requests *seeking from Ms. Alyn binding admissions or denials to facts that are exclusively related to Southern Land's business*. Not surprisingly, Ms. Alyn responded that she is unable to admit or deny facts regarding Southern Land's business. Namely, Southern Land wants Ms. Alyn to make binding admissions or denials regarding the specific types of services offered by Southern Land, when did Southern Land begin offering those services and whether Southern Land developed and designed the geographical area known as Westhaven. Southern Land surely knows the answer to these questions; Ms. Alyn does not.

Southern Land's motion challenges Ms. Alyn's responses on two (2) grounds: (i) Ms. Alyn's responses that she cannot admit or deny the requests are false; and, (ii) Ms. Alyn's

responses are technically insufficient because Ms. Alyn did not state that she made a reasonable inquiry and that the information necessary to answer the requests is not readily available.

In an attempt to demonstrate that Ms. Alyn's responses are false, Southern Land refers to Request for Admission No. 12 which asks Ms. Alyn to admit or deny whether Southern Land offers real estate services. Ms. Alyn has no knowledge whether Southern Land offers real estate services and, if so, how those services are offered (for example, through an affiliate of Southern Land, by contracted agents (not employees) or through a myriad of other structural manners). ***Southern Land's admission requests address facts that are primarily or exclusively within the knowledge of Southern Land and should be left to Southern Land to prove up in these proceedings. Ms. Alyn cannot be forced to admit or deny -- in binding fashion -- facts that are not within her knowledge.***

Southern Land next contends that Ms. Alyn's responses do not comply with Rule 36 because the Rule provides that lack of information may not be given as a reason for failure to admit or deny unless the party states that she has made reasonable inquiry and that the information known or readily available by her is insufficient to enable her to admit or deny. While Ms. Alyn's responses do not specifically state that the information necessary to answer the request is not readily available, it is clear that is Ms. Alyn's position. Ms. Alyn will provide amended responses which include this language in response to these requests, if the Board finds that exercise to be meaningful.¹⁴ It is clear, though, that Southern Land advances this argument for the sole purpose of delaying these proceedings.

¹⁴ When imposing an obligation on the responding party to seek out information to answer an admission request, courts have generally only intervened when the responding party has the means to independently ascertain the truth. Thus, if the information is held by the responding party or by an individual or entity with which the responding party maintains a relationship that enables it to readily procure the required information, then that party may be expected to seek out the information and respond substantively. Here, ***Southern Land does not suggest that Ms. Alyn failed to make a reasonable inquiry or that Ms. Alyn failed to confer with some source to obtain the information necessary to answer these requests.*** The facts which are the subject of these requests are held by Southern Land - not Ms. Alyn or any agent or affiliate of Ms. Alyn. Southern Land's argument is much more mundane; that the Board should require Ms. Alyn to add this boilerplate phrase to her responses: "Ms. Alyn made a reasonable inquiry and the information known or readily available by her is insufficient to enable her to admit or deny." Southern Land's request does nothing to further these proceedings. It is a waste of time, meant to harass Ms. Alyn by creating unnecessary work, and, more importantly, delay these proceedings.

C. Ms. Alyn's Signature on Interrogatories

As Southern Land acknowledges, Ms. Alyn agreed to provide a signed verification of her discovery responses.

D. Ms. Alyn Should Not Be Compelled to Supplement Her Initial Disclosures

Lastly, Southern Land asks the Board to Order Ms. Alyn to supplement her initial disclosures by (i) identifying the subjects of information for which each disclosed individual has personal knowledge; and, (ii) to include a copy of the listed documents or state the location of the listed document. A motion to compel discovery must be supported by a written statement from the moving party showing that the party has made a good faith effort, by conference or correspondence, to resolve the issues with the other party, but that the parties were unable to resolve their differences. *See* Trademark Rule 2.120(e)(1), 37 CFR § 2.120(e)(1); TBMP § 523.02 (2013). *Cf. The Phillies v. Phila. Consol. Holding Corp.*, 107 USPQ2d 2149, 2151 (TTAB 2013). The parties have never conferred on this issue; indeed, Southern Land's motion was the first time that Ms. Alyn knew that Southern Land perceived these deficiencies. Because Southern Land failed to confer, Ms. Alyn respectfully requests that the Board deny this request.

Because Southern Land failed to confer with Ms. Alyn regarding this purported deficiency, it is unclear to Ms. Alyn how the dispute can be resolved. Southern Land claims that Ms. Alyn failed to identify the subjects of information for each disclosed individual. That statement is false. As clearly shown in Ms. Alyn's disclosures, attached to Southern Land's motion as Exhibit E, for each witness Ms. Alyn has clearly identified which subjects for which the witness has personal knowledge. If Southern Land believes that disclosure need be in a different form (it is substantively provided in the same form in which Southern Land made its disclosures), Ms. Alyn will supplement her disclosures following the appropriate discovery conference.

As for Southern Land's objection regarding the location of documents, had Southern Land conferred with Ms. Alyn, Ms. Alyn would have willingly disclosed that all documents are available at the office of Ms. Alyn's counsel. If the Board finds it necessary -- despite Southern Land's failure to conference -- Ms. Alyn will formally supplement her disclosures to include this statement.

IV. CONCLUSION

Faced with a request to inspect its documents and depose its key employees, Southern Land resorted to filing a meritless motion which seeks to compel significant amounts of information that has absolutely no relevance to the claims in this proceeding. In support of its motion, Southern Land relies on Board precedent that is immediately distinguishable (because this is not a likelihood of confusion dispute) and was based on legal standards that no longer govern discovery. Ms. Alyn respectfully submits that Southern Land's motion should be denied and Southern Land should be admonished for its efforts to delay these proceedings.

Respectfully submitted,

Dated: October 21, 2014

/s/ Greg Latham
Gregory D. Latham
Brandon Frank
Intellectual Property Consulting, LLC
201 St. Charles, Suite 2500
New Orleans, LA 70170
Telephone: (504) 322-7166
Facsimile: (504) 322-7184
E-mail: glatham@iplawconsulting.com

Attorney for Petitioner, Lisa Alyn

CERTIFICATE OF SERVICE

I certify that on this 21st day of October 2014, a true copy of the above Petitioner's Memorandum in Opposition of Respondent's Motion to Compel was served via e-mail and via First Class Mail on Respondent's counsel:

James R. Michels
Stites & Harbison PLLC
401 Commerce St., Suite 1800
Nashville, TN 37219
E-mail: randy.michels@stites.com

Mari-Elise Taube
Stites & Harbison PLLC
1199 North Fairfax St., Suite 900
Alexandria, VA 22314
E-mail: mtaube@stites.com

By: /S/ Greg Latham
Gregory D. Latham

EXHIBIT 1

Greg Latham

From: Greg Latham [glatham@iplawconsulting.com]
Sent: Wednesday, October 01, 2014 3:12 PM
To: 'Michels, James R.'; 'brandon@proentertainmentlaw.com'
Cc: 'Taube, Mari-Elise'
Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Randy -- please provide us with convenient dates/times to inspect the documents identified in Southern Land's discovery responses. We presume that inspection will occur in Westhaven or Nashville. Brandon and/or I will be traveling for the document inspection. On the same trip, we would like to take the following depositions:

- 30(b)(6) deposition of Southern Land;
- deposition of Mary Lee Bennett
- deposition of Tim Downey

The depositions should be scheduled for the day following the document inspection. If we can start the depositions early, we should be able to conclude all three on the same day.

Please let us know of a convenient date(s) to scheduled these discovery matters.

Greg Latham
Intellectual Property Consulting
glatham@iplawconsulting.com
Phone: 504.322.7166
Fax: 504.322.7184

From: Michels, James R. [<mailto:randy.michels@stites.com>]
Sent: Monday, September 22, 2014 5:41 PM
To: Greg Latham; brandon@proentertainmentlaw.com
Cc: Taube, Mari-Elise
Subject: Lisa Alyn v. Southern Land Company - Discovery Responses

Attached you will find copies of Southern Land Company's discovery responses. Hard copies will follow via regular mail.

James ("Randy") Michels

Member
Direct: 615-782-2234
Fax: 615-742-7215
randy.michels@stites.com

STITES & HARBISON PLLC
401 Commerce Street, Suite 800, Nashville, TN 37219
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EXHIBIT 2

Greg Latham

From: Greg Latham [glatham@iplawconsulting.com]
Sent: Friday, October 03, 2014 8:53 AM
To: 'Michels, James R.'; 'brandon@proentertainmentlaw.com'
Cc: 'Taube, Mari-Elise'
Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Randy -- can we hear from you today regarding dates for inspection of documents and depositions?
Thanks.

Greg Latham
Intellectual Property Consulting
glatham@iplawconsulting.com
Phone: 504.322.7166
Fax: 504.322.7184

From: Greg Latham [mailto:glatham@iplawconsulting.com]
Sent: Wednesday, October 01, 2014 3:50 PM
To: 'Michels, James R.'; 'brandon@proentertainmentlaw.com'
Cc: 'Taube, Mari-Elise'
Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Randy -- we'll get a formal notice out to you very soon, but in the meantime, here are the 30(b)(6) topics:

- Southern Land's contention that the WESTHAVEN term is not geographically descriptive;
- Southern Land's creation and development of the WESTHAVEN designation;
- Southern Land's consideration of other designations which were considered instead of the term WESTHAVEN;
- Southern Land's knowledge of other geographical locations that use the WESTHAVEN designation;
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- Southern Land's prosecution of its application to register the term WESTHAVEN with the USPTO;
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- Southern Land's licensing (or authorization granted to third parties) of the WESTHAVEN designation;
- Southern Land's efforts to police and enforce its purported rights in the WESTHAVEN designation;
- Southern Land's knowledge of third party use of the term WESTHAVEN;
- Third party challenges to the validity of the purported WESTHAVEN trademark;
- The subject matter for each witness and category of documents identified in Southern Land's Rule 26 Initial Disclosures

Thanks

Greg

Greg Latham
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glatham@iplawconsulting.com

Phone: 504.322.7166

Fax: 504.322.7184

From: Michels, James R. [<mailto:randy.michels@stites.com>]

Sent: Wednesday, October 01, 2014 3:26 PM

To: Greg Latham; brandon@proentertainmentlaw.com

Cc: Taube, Mari-Elise

Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Please send me the 30(b)(6) topics so I can figure out who the appropriate representatives will be.

From: Greg Latham [<mailto:glatham@iplawconsulting.com>]

Sent: Wednesday, October 01, 2014 3:12 PM

To: Michels, James R.; brandon@proentertainmentlaw.com

Cc: Taube, Mari-Elise

Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Randy -- please provide us with convenient dates/times to inspect the documents identified in Southern Land's discovery responses. We presume that inspection will occur in Westhaven or Nashville. Brandon and/or I will be traveling for the document inspection. On the same trip, we would like to take the following depositions:

- 30(b)(6) deposition of Southern Land;
- deposition of Mary Lee Bennett
- deposition of Tim Downey

The depositions should be scheduled for the day following the document inspection. If we can start the depositions early, we should be able to conclude all three on the same day.

Please let us know of a convenient date(s) to scheduled these discovery matters.

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glatham@iplawconsulting.com

Phone: 504.322.7166

Fax: 504.322.7184

From: Michels, James R. [<mailto:randy.michels@stites.com>]

Sent: Monday, September 22, 2014 5:41 PM

To: Greg Latham; brandon@proentertainmentlaw.com

Cc: Taube, Mari-Elise

Subject: Lisa Alyn v. Southern Land Company - Discovery Responses

Attached you will find copies of Southern Land Company's discovery responses. Hard copies will follow via regular mail.

James ("Randy") Michels

Member

Direct: 615-782-2234

Fax: 615-742-7215

randy.michels@stites.com

STITES & HARBISON PLLC

401 Commerce Street, Suite 800, Nashville, TN 37219

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[LinkedIn](#) | [Twitter](#) | [Blog](#)

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EXHIBIT 3

Greg Latham

From: Michels, James R. [randy.michels@stites.com]
Sent: Friday, October 10, 2014 2:40 PM
To: Greg Latham
Cc: brandon@proentertainmentlaw.com; Taube, Mari-Elise
Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

We're happy to work with you to find dates once the Board rules on the motion to compel.

From: Greg Latham [mailto:glatham@iplawconsulting.com]
Sent: Thursday, October 09, 2014 1:37 PM
To: Michels, James R.
Cc: brandon@proentertainmentlaw.com; Taube, Mari-Elise
Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Randy -- the Board will likely suspend the proceedings due to the filing of your motion to compel. But, eventually, we will have to schedule these depositions and Southern Land will have to allow us the opportunity to inspect the documents it has identified in its discovery requests. I suggest that we go ahead and get those events calendared so when the compel motion is resolved, we are ready to move forward.

Please provide us with two consecutive days on which we can inspect documents the first day and depose Ms. Bennett and Mr. Downey the next day. I suggest we look at dates in mid-November.

Thanks.

Greg

From: Michels, James R. [mailto:randy.michels@stites.com]
Sent: Tuesday, October 07, 2014 6:04 PM
To: Greg Latham
Cc: brandon@proentertainmentlaw.com; Taube, Mari-Elise
Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

The Board will be suspending the proceeding due to the filing of our motion to compel.

From: Greg Latham [mailto:glatham@iplawconsulting.com]
Sent: Tuesday, October 07, 2014 4:38 AM
To: Michels, James R.
Cc: brandon@proentertainmentlaw.com; Taube, Mari-Elise
Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Randy -- because Brandon and I will have to travel to Nashville for these depositions, we'd like to schedule them for the same day. Please provide us with some dates that Ms. Bennett and Mr. Downey are both available.

Thanks.

Greg Latham
Intellectual Property Consulting
glatham@iplawconsulting.com

Phone: 504.322.7166

Fax: 504.322.7184

From: Michels, James R. [<mailto:randy.michels@stites.com>]

Sent: Friday, October 03, 2014 3:17 PM

To: Greg Latham

Cc: brandon@proentertainmentlaw.com; Taube, Mari-Elise

Subject: RE: Lisa Alyn v. Southern Land Company - Discovery Responses

Mary Lee Bennett is available October 6-8. She would likely be the 30(b)(6) representative as well.

Tim Downey has availability on the afternoon of October 13.

From: Michels, James R.

Sent: Friday, October 03, 2014 9:02 AM

To: Greg Latham

Cc: brandon@proentertainmentlaw.com; Taube, Mari-Elise

Subject: Re: Lisa Alyn v. Southern Land Company - Discovery Responses

Yes, I will get back to you later today.

James ("Randy") Michels

Stites & Harbison, PLLC

[401 Commerce Street, Suite 800](#)

[Nashville, Tennessee 37219](#)

Direct Dial: [\(615\) 782-2234](tel:(615)782-2234)

Direct Fax: [\(615\) 742-7215](tel:(615)742-7215)

Email: randy.michels@stites.com

Blog: www.trademarkologist.com

On Oct 3, 2014, at 8:53 AM, "Greg Latham" <glatham@iplawconsulting.com> wrote:

Randy -- can we hear from you today regarding dates for inspection of documents and depositions?
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Greg Latham

Intellectual Property Consulting

glatham@iplawconsulting.com

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Member
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EXHIBIT 4

October 21, 2013

James R. Michels
(615) 782-2234
(615) 742-7215 FAX
randy.michels@stites.com

VIA UPS

Lisa Alyn
SilverPointe Properties
7105 Crossroads Blvd., Suite 102
Brentwood, TN 37027

RE: Your Use of the WESTHAVEN Trademark

Dear Ms. Alyn:

This law firm represents Southern Land Company in its intellectual property matters.

It has come to our attention that you are using the WESTHAVEN trademark to advertise your real estate services.

Please be advised that your use of the WESTHAVEN trademark to advertise your real estate services is in violation of Southern Land Company's rights under federal and state law. Southern Land Company owns an incontestable federal trademark registration for the WESTHAVEN mark, which is the subject of U.S. Trademark Reg. No. 3,101,151. Please see enclosed Exhibit A. The public associates the WESTHAVEN mark with the services provided by Southern Land Company and its affiliated real estate brokerage, Westhaven Realty. The WESTHAVEN trademark is extremely valuable to Southern Land Company, and it takes every measure necessary to protect its valuable intellectual property.

The fact that you are a resident of Westhaven combined with the fact that you are using the WESTHAVEN trademark and name in connection with the promotion of real estate services only heightens the probability that the public will be confused about your affiliation.

We have become aware that you are using the WESTHAVEN trademark on your website and in your domain name. A copy of your website homepage is enclosed as Exhibit B. While we appreciate your addition of a small disclaimer at the bottom of the webpage, it does not eliminate the risk of consumer confusion.

We are writing as a courtesy to you on the assumption that you are using the WESTHAVEN mark without knowing the legal consequences. Now that we have brought this matter to your attention and you are aware of the nature and scope of our client's rights, we trust you will voluntarily stop using the WESTHAVEN trademark to advertise your real estate services. We also need you to (a) promptly transfer westhavenfranklin.com and

10797N:131487:1021216:2:NASHVILLE

Lisa Alyn
October 21, 2013
Page 2

westhavenfranklin.net, and any other domain name that you own that includes the term "westhaven," to Southern Land Company; and (b) confirm that you will not register any domain name including the term "westhaven" in the future.

Please respond to me in writing regarding your willingness to stop using the WESTHAVEN trademark and to arrange for the details of the domain name transfers. It is important that I hear from you by November 15, 2013.

Finally, please note that this it is not the goal of the Southern Land Company to limit your ability to provide real estate services in the Westhaven neighborhood. You are free to continue referring to the Westhaven community in a truthful, non-misleading way. You simply cannot use the WESTHAVEN mark in any way that suggests an affiliation with or endorsement by Southern Land Company or its affiliate, Westhaven Realty. You also cannot use the WESTHAVEN trademark in a domain name.

Thank you for your prompt attention to this matter, and we look forward to hearing from you.

Very truly yours,

STITES & HARBISON PLLC



James R. Michels

Enclosures

EXHIBIT A

Int. Cls.: 36, 37, 42, and 44

Prior U.S. Cls.: 100, 101, 102, 103, and 106

United States Patent and Trademark Office

Reg. No. 3,101,151

Registered June 6, 2006

**SERVICE MARK
PRINCIPAL REGISTER**

WESTHAVEN

SOUTHERN LAND COMPANY, LLC (TENNESSEE LTD LIABILITY CO)
501 CORPORATE CENTER DRIVE, SUITE 200
FRANKLIN, TN 370672661

FOR: REAL ESTATE BROKERAGE SERVICES; LEASING OF REAL ESTATE; REAL ESTATE MANAGEMENT, IN CLASS 36 (U.S. CLS. 100, 101 AND 102).

FIRST USE 1-31-2002; IN COMMERCE 1-31-2002.

FOR: REAL ESTATE DEVELOPMENT; LAND DEVELOPMENT SERVICES, NAMELY, MASTER PLANNING AND LAYING OUT OF RESIDENTIAL AND/OR COMMERCIAL COMMUNITIES; RESIDENTIAL AND COMMERCIAL BUILDING CONSTRUCTION AND CONSTRUCTION MANAGEMENT SERVICES; GOLF COURSE CONSTRUCTION; LANDSCAPE LIGHTING INSTALLATION SERVICES; INSTALLATION OF LANDSCAPE IRRIGATION SYSTEMS, IN CLASS 37 (U.S. CLS. 100, 103 AND 106).

FIRST USE 1-31-2002; IN COMMERCE 1-31-2002.

FOR: LANDSCAPE LIGHTING DESIGN; INTERIOR DECORATING; ARCHITECTURAL DESIGN; ARCHITECTURAL DRAFTING SERVICES, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 3-31-2003; IN COMMERCE 3-31-2003.

FOR: LANDSCAPE GARDENING DESIGN FOR OTHERS; LANDSCAPE MAINTENANCE SERVICES, NAMELY, LAWN AND PLANT CARE; LANDSCAPE INSTALLATION SERVICES, NAMELY, LANDSCAPE GARDENING, IN CLASS 44 (U.S. CLS. 100 AND 101).

FIRST USE 4-30-2003; IN COMMERCE 4-30-2003.

SN 76-524,401, FILED 6-20-2003.

CHRISTOPHER OTT, EXAMINING ATTORNEY

EXHIBIT B



Lisa Alyn

[WESTHAVEN SEARCH](#) [MLS SEARCH](#) [BUYERS](#) [SELLERS](#) [RESOURCES](#)
[ABOUT](#) [CONTACT](#)



PROPERTIES



GOLF CLUB



AMENITIES



COMMUNITY



TOWN
CENTER

FEATURED PROPERTY



[See more...](#)

THE WESTHAVEN EXPERIENCE



WHAT OTHERS ARE SAYING

WELCOME TO WESTHAVEN...



... a gracious planned community in Historic Franklin, TN! Nestled against the rolling hills of Williamson County, Westhaven is an award-winning neighborhood comprised of spectacular amenities, including a private 18-hole golf course, convenient Town Center, and walkable

elementary school... [More about Westhaven](#)

The heart of westhavenfranklin.com is Lisa Alyn, a long time Westhaven resident and expert on all things Westhaven. Lisa makes the real estate process enjoyable, friendly and fun, while she approaches her work with absolute integrity and the highest ethical standards... [More about Lisa](#)

WESTHAVEN WEEKLY

Follow Lisa's adventures in Westhaven and real estate at the [Westhaven Weekly](#).



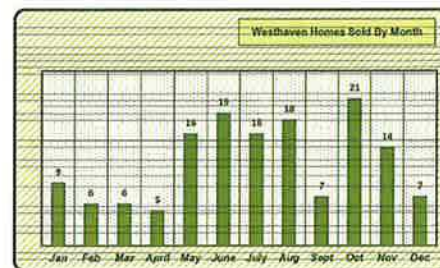
Lisa's real estate knowledge and expertise in Westhaven and surrounding communities was so greatly superior to that of other realtors with whom we have worked that, ...

[See more](#)

We followed Lisa's marketing advice and sold our home quickly and for a profit! ... [See more](#)

[More Testimonials](#)

WESTHAVEN SALES ANALYSIS





[View the complete analysis](#)

This website is owned by Lisa Alyn of SilverPointe Properties and is not affiliated with Westhaven Realty or Southern Land Company.

[Home](#) | [Properties](#) | [Golf Club](#) | [Amenities](#) | [Community](#) | [Town Center](#) | [Contact](#) | [Site Map](#)

LISA ALYN, Realtor® C-RCS | C | F 615.371.6310 | License # 304 4111 | email Lisa

SilverPointe Properties | 7105 Crossroads Blvd. Suite 102 Brentwood, TN 37027 | P | F 615.377.3219  

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